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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 JASON LEE SUTTON,

10 Plaintiff,

11 v.

12 WASHINGTON STATE DEPARTMENT

13 OF CORRECTIONS, et al.,

14 Defendants.
15

No. 4:15-cv-05123-SAB

**ORDER ADOPTING REPORT
AND RECOMMENDATION;
CLOSING FILE**

16 Before the Court is Magistrate Judge Dimke's Report and
17 Recommendation. ECF No. 144. Judge Dimke recommends this Court grant
18 Defendants' Motion for Summary Judgment because Defendants did not violate
19 Plaintiff's constitutional rights. Plaintiff filed timely objections to the Report and
20 Recommendation. ECF No. 146.

21 **Legal Standard**

22 A party may file specific written objections to the findings and
23 recommendations of a United States Magistrate Judge. 28 U.S.C. § 636(b)(1);
24 LMR 4, Local Rules for the Eastern District of Washington. Upon the filing of
25 such objections, the Court must make a de novo determination of those portions of
26 the Record to which objections are made. *Id.* The Court may accept, reject, or
27 modify, in whole or in part, the findings or recommendations made by the
28 Magistrate Judge. *Id.*

1 Plaintiff is bringing his claims under 42 U.S.C. § 1983. In order to state a
2 claim under section 1983, Plaintiff must allege facts that establish that: (1)
3 Defendants acted under color of state law; and (2) Defendants caused him to be
4 deprived of a right secured by the Constitution and laws of the United States.
5 *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997).

6 Summary judgment is appropriate if the “pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the affidavits, if any,” show
8 there is no genuine issue as to any material fact and the moving party is entitled to
9 judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986);
10 Fed. R. Civ. P. 56(c). There is no genuine issue for trial unless there is sufficient
11 evidence favoring the nonmoving party for a jury to return a verdict in that party’s
12 favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving
13 party has the initial burden of showing the absence of a genuine issue of fact for
14 trial. *Celotex*, 477 U.S. at 325. If the moving party meets its initial burden, the
15 non-moving party must go beyond the pleadings and “set forth specific facts
16 showing that there is a genuine issue for trial.” *Id.* at 324; *Anderson*, 477 U.S. at
17 250.

18 In addition to showing there are no questions of material fact, the moving
19 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
20 *Wash. Law School*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is
21 entitled to judgment as a matter of law when the non-moving party fails to make a
22 sufficient showing on an essential element of a claim on which the non-moving
23 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party
24 cannot rely on conclusory allegations alone to create an issue of material fact.
25 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

26 When considering a motion for summary judgment, a court may neither
27 weigh the evidence nor assess credibility; instead, “the evidence of the non-
28 movant is to be believed, and all justifiable inferences are to be drawn in his

1 favor.” *Anderson*, 477 U.S. at 255.

2 Under the doctrine of qualified immunity, a government official who
3 violates a person’s constitutional rights may still avoid liability insofar as their
4 conduct does not violate clearly established statutory or constitutional rights of
5 which a reasonable person would have known. *Pearson v. Callahan*, 555 U.S. 223,
6 231 (2009). “The protection of qualified immunity applies regardless of whether
7 the government official’s error is a ‘mistake of law, mistake of fact, or a mistake
8 based on mixed questions of law or fact.’” *Id.* (quoting *Groh v. Ramirez*, 540 U.S.
9 551, 567 (2004)). “Put simply, qualified immunity protects ‘all but the plainly
10 incompetent or those who knowingly violate the law.’” *Mullenix v. Luna*,
11 __ U.S. __, 136 S.Ct. 305, 308 (2015).

12 In determining whether an official is entitled to qualified immunity, the
13 Court answers two questions: (1) whether a constitutional right was violated; and
14 (2) whether the right was clearly established. *Tortu v. Las Vegas Metro. Police*
15 *Dep’t.*, 556 F.3d 1075, 1085 (9th Cir. 2009). The order in which these questions
16 are answered is left to the sound discretion of the district court judge. *Pearson*,
17 555 U.S. at 236.

18 **Plaintiff’s Complaint**

19 In his First Amended Complaint, Plaintiff alleges his First and Fourteenth
20 Amendment rights were violated by all Defendants. ECF No. 14. At the heart of
21 his claims is the allegation that Defendants hindered his efforts to pursue a legal
22 claim in the federal courts. He asserts that in the process of filing suit against the
23 Washington State Department of Corrections (a separate action filed in 2013), he
24 attempted on three different times to contact an inmate, Travis Newell, through the
25 inmate to inmate mail system. Plaintiff was attempting to obtain a witness
26 statement from Mr. Newell. Plaintiff believes that Mr. Newell never received his
27 letters. Plaintiff sent the first letter on September 13, 2013 and he did not receive a
28 response from Mr. Newell. He was told in 2014 that Mr. Newell’s counselor

1 indicated that Mr. Newell “had no knowledge of any legal issue” pertaining to
2 Plaintiff. He sent two more letters in June and July, 2015. It is undisputed that
3 Defendants intercepted these letters, read them, and determined they were
4 threatening in tone in violation of prison regulations.

5 Plaintiff was issued an infraction for the June 21, 2015 letter and another
6 infraction for the July 13, 2015 letter. Separate hearings were held on each
7 infraction. He was found not guilty of the first infraction and was found guilty of
8 the second infraction. Although he received the notice of the hearing on the
9 infractions, he never received any notification that the two letters had been
10 rejected as required by prison regulations.

11 Plaintiff alleges that because he was unable to obtain Mr. Newell’s witness
12 statements, he was unable to adequately oppose the motion for summary judgment
13 that was filed in the 2013 case, and his case was dismissed. He believes the letters
14 were intercepted in order to prevent him from obtaining evidence relevant to the
15 2013 case. Plaintiff asserts that his due process rights were violated when he did
16 not receive any Mail Rejection Notices detailing why the mail was rejected so that
17 he could challenge them. He alleges Defendants violated his First Amendment
18 rights by censoring and restricting his speech, and also punishing him for his
19 speech. He also alleges Defendants retaliated against him because he previously
20 filed lawsuits.

21 **Plaintiff’s Objections**

22 1. Plaintiff appears to clarify that Lt. Pierce was not the hearing officerst
23 who presided over the first hearing. In the Report and Recommendation,
24 Magistrate Judge Dimke indicated that Lt. Pierce signed written findings, but did
25 not indicate that he was the hearing officer. ECF No. 144 at 5. Plaintiff does not
26 challenge that it was Lt. Pierce who ssigned the written findings. While Plaintiff’s
27 clarification is noted, this additional fact is not relevant as to whether summary
28 judgment is appropriate.

1 2. With respect to Judge Dimke’s ruling on the due process violation,
2 Plaintiff argues that the serving of a Major Infraction Report does not take away or
3 replace his right to proper due process protections with respect to his mail being
4 rejected. However, Judge Dimke did not base her reasoning on the fact that the
5 infractions and subsequent hearing provided all the process that was due to
6 Plaintiff. Rather, Judge Dimke assumed that Defendants failed to notify Plaintiff
7 that his mail was rejected, but concluded that at most, this conduct constitutes
8 negligence and does not implicate due process.

9 Prisoners have a Fourteenth Amendment due process liberty interest in
10 “uncensored communication by letter,” although this interest is “qualified of
11 necessity by the circumstance of imprisonment.” *Procunier v. Martinez*, 416 U.S.
12 396, 413-14 (1974), *overruled on other grounds by Thornburg v. Abbott*, 490 U.S.
13 401, 406 (1989). At the minimum, due process requires: (1) notifying the inmate
14 of the rejection of the letter; (2) allowing the author of the letter a reasonable
15 opportunity to protest that decision; and (3) referring any complaints to a prison
16 official other than the person who made the censorship decision. *Procunier*, 416
17 U.S. at 417. If a meaningful post-deprivation remedy exists for an alleged
18 deprivation of property, that post-deprivation remedy is sufficient to satisfy the
19 requirements of due process. *Sorrels v. McKee*, 290 F.3d 965, 972 (9th Cir. 2002).
20 Mere negligence on the part of prison officials is not actionable as a due process
21 violation under § 1983. *Id.* On the other hand, “a deprivation . . . caused by
22 conduct pursuant to established state procedure, rather than random and
23 unauthorized action, does state a § 1983 claim.” *Id.* (quoting *Hudson v. Palmer*,
24 468 U.S. 517, 532 (1984)). Stated another way, “[o]nly if the failure to provide
25 notice was pursuant to prison policy does this constitute a due process violation
26 actionable under § 1983.” *Id.*

27 Judge Dimke correctly concluded that Plaintiff failed to establish that his
28 due process rights were violated when he did not receive notification of the

1 rejection of his letters. His failure to receive notice was not pursuant to prison
2 policy. Rather, he has demonstrated that, at most, the prison was negligent in
3 failing to provide him the requisite notice. As such, summary judgment with
4 respect to his due process claim is appropriate.

5 3. With respect to Judge Dimke’s ruling on Plaintiff’s First Amendment
6 right of access to courts claim, Plaintiff argues that his not-guilty verdict on the
7 first letter leads to the conclusion that his guilty verdict on the second letter was in
8 error, especially since the letters were very similar. At the heart of this claim is
9 that Plaintiff has been attempting to communicate with Mr. Newell for over four
10 years in order to adequately present his other case and Defendants continued to
11 thwart his efforts by failing to mail the letters.

12 While prison officials have no affirmative duty to help an inmate litigate his
13 claims once they have been filed, *Lewis v. Casey*, 518 U.S. 343, 354 (1996), prison
14 officials may not erect barriers that impede the right of access of incarcerated
15 persons. *Silva v. DiVittorio*, 658 F.3d 1090, 1102–04 (9th Cir. 2011), *overruled on*
16 *other grounds as stated by Richey v. Dahne*, 807 F.3d 1202, 1209 n.6
17 (9th Cir. 2015). “Thus, aside from their affirmative right to the tools necessary to
18 challenge their sentences or conditions of confinement, prisoners also have a right,
19 protected by the First Amendment right to petition and the Fourteenth Amendment
20 right to substantive due process ‘to pursue legal redress for claims that have a
21 reasonable basis in law or fact.’” *Id.* (quoting *Snyder v. Nolen*, 380 F.3d 279, 290
22 (7th Cir. 2004)). The right of access to the courts includes “the opportunity to
23 prepare, serve and file whatever pleadings or other documents are necessary or
24 appropriate in order to commence or prosecute court proceedings affecting one’s
25 personal liberty, or to assert and sustain a defense therein, and to send and receive
26 communications to and from judges, courts and lawyers concerning such matters.”
27 *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir. 1961). A prisoners’ First and
28 Fourteenth Amendment rights to access the courts without undue interference

1 extends beyond the pleading stages. *Silva*, 658 F.3d at 1103. Indeed, the Ninth
2 Circuit made very clear that this constitutional right to litigate claims challenging
3 an inmate's sentence or the condition of his or her confinement without active
4 interference by prison officials extends to the conclusion of the proceedings. *Id.* In
5 order to bring such a claim, Plaintiff must show active interference on the part of
6 the prison officials and actual injury. *Id.* at 1102-03. "Actual injury . . . is 'actual
7 prejudice with respect to contemplated or existing litigation, such as the inability
8 to meet a filing deadline or to present a claim.'" *Nev. Dep't of Corr. v. Greene*,
9 648 F.3d 1014, 1018 (9th Cir. 2011). To satisfy the actual injury requirement, an
10 inmate must "demonstrate that a nonfrivolous legal claim had been frustrated or
11 was being impeded." *Lewis*, 518 U.S. at 353.

12 Plaintiff cannot show actual injury for the confiscation of the 2015 letters.
13 As Plaintiff correctly points out, there were three letters sent to Mr. Newell. The
14 first letter was sent in September, 2013. Plaintiff assumes that Mr. Newell never
15 received the letter because Mr. Newell did not provide the witness statements.
16 However, this assumption is at best speculation. There is nothing in the record to
17 suggest that Defendants withheld this letter. Indeed, with respect to the second and
18 third letters, even if Plaintiff did not receive any official notification that his letter
19 was withheld, he received infractions, which had the effect of notifying him that
20 the letter was withheld. The only reasonable inference is that the 2013 letter was
21 sent, Mr. Newell received the letter, and he chose not to respond. This inference is
22 consistent with the report from Mr. Newell's counselor that he did not have any
23 information regarding Plaintiff's lawsuit. The 2013 letter cannot be the basis for
24 any actual injury based on Defendant's conduct.

25 Additionally, as Judge Dimke pointed out, the docket in the 2013 case
26 indicates that all summary judgment pleadings were submitted before Plaintiff
27 drafted his June 21, 2015 letter to Mr. Newell. He also filed his witness list prior
28 to the June 21, 2015 letter. Thus, although Plaintiff had difficulty obtaining the

1 witness statements, this difficulty was not because the letters were not sent. Even
2 if the letters were sent and Mr. Newell responded, it would have been too late to
3 defeat the summary judgment motions. In short, Mr. Newell's refusal to participate
4 in the underlying lawsuit was not because Defendants failed to send the 2015
5 letters.

6 The Court agrees with Judge Dimke that Plaintiff has failed to raise a triable
7 issue as to whether Defendants' actions caused an injury or actually frustrated or
8 impeded his ability to litigate a nonfrivolous claim. As such, summary judgment
9 on this claim is appropriate.

10 4. With respect to Judge Dimke's ruling on his First Amendment Right
11 to Correspond, Plaintiff asserts that Defendants over-exaggerated their security
12 response to his choice of text in his letters. He maintains that Defendants' actions
13 were unjustified according to the regulations.

14 Notably, Plaintiff does not take issue with Judge Dimke's conclusion that
15 the regulations further the governmental interests of protecting inmates and
16 improving inmate conduct. The Court agrees that the regulations pass
17 constitutional scrutiny.

18 Instead, Plaintiff maintains that the language he used in the letters was not
19 threatening or coercive in nature and should not have been intercepted. However,
20 this cannot be the basis for a constitutional violation. Courts necessarily confer a
21 certain degree of discretion on prison authorities to determine what constitutes
22 threatening or coercive mail. *See Bell v. Wolfish*, 441 U.S. 520, 547 (1979)
23 (instructing that courts must accord prison administrators wide-ranging deference
24 in the adoption and *execution* of policies and practices that, in their judgment, are
25 needed to preserve institutional order, discipline, and security) (emphasis added).
26 Moreover, even if the officials did not follow prison policy, this does not, in itself,
27 amount to a constitutional violation. *Counsins v. Lockyer*, 568 F.3d. 1063, 1070
28 (9th Cir. 2009) (noting that state departmental regulations do not establish federal

1 constitutional violations). Plaintiff has not established that his constitutional rights
2 to correspond was violated. As such, summary judgment on this claim is
3 appropriate.

4 5. With respect to Judge Dimke’s ruling on his First Amendment
5 retaliation claim, Plaintiff argues there were no “legitimate” correctional purposes
6 motivating Defendants’ actions since his choice of language was not “coercive” or
7 “intimidating.” Plaintiff believes his letters were confiscated in retaliation for him
8 filing the federal lawsuit in 2013.

9 Within the prison context, in order to succeed with a First Amendment
10 retaliation claim, the inmate must show: (1) prison officials took some adverse
11 action against an inmate: (2) because of (3) that prisoner’s protected conduct, and
12 that such action (4) chilled the inmate’s exercise of his First Amendment rights;
13 and (5) the action did not reasonably advance a legitimate correctional goal.
14 *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

15 Here, the record does not support the conclusion that the prison officials
16 confiscated his two letters as a result of Plaintiff’s filing of the 2013 action. As set
17 forth above, there is nothing in the record to suggest that Plaintiff’s 2013 letter
18 was confiscated. Rather, it is more than likely that Mr. Newell received the letter
19 and chose not to respond. Again, the timing of the second and third letter also
20 suggest that the confiscation of the letters was not because of the lawsuit (the
21 briefing for the motion for summary judgment was submitted prior to Plaintiff
22 sending the letters).

23 The Court agrees with Judge Dimke that the record does not support an
24 inference that prison officials were motivated to retaliate against Plaintiff. As
25 such, summary judgment with respect to Plaintiff’s retaliation claim is appropriate.

26 6. With respect to Judge Dimke’s ruling regarding Defendant Holbrook,
27 Plaintiff argues that Defendant Holbrook should have acted to investigate and
28 prevent the wrongful conduct of the other Defendants. He asserts that Defendant

1 Holbrook was aware of the problems/complaints made against the WSP mailroom
2 staff and yet he took no action to prevent the continued interference and
3 harassment of Plaintiff.

4 As set forth in Judge Dimke's Report and Recommendation and this Order,
5 Plaintiff has failed to establish that his constitutional rights were violated by the
6 other Defendants. A supervisor is only liable for the constitutional violations of
7 his subordinates if the supervisor participated in or directed the violations, or
8 knew of the violations and failed to act to prevent them. *Taylor v. List*, 880 F.2d
9 1040, 1045 (9th Cir. 1989). If the subordinates did not violate Plaintiff's
10 constitutional rights, it follows that Defendant Holbrook did not either, under any
11 theory of supervisory liability.

12 Similarly, it is not necessary to undertake a qualified immunity analysis as
13 Plaintiff has failed to establish that his constitutional rights were violated.

14 **Conclusion**

15 In her Report and Recommendation, Magistrate Judge Dimke analyzed each
16 of Plaintiff's claims and provided a well-reasoned and thorough analysis
17 explaining why summary judgment in favor of Defendants is appropriate. The
18 Court has reviewed and considered Plaintiff's objections and has not found any
19 basis with which to reject Magistrate Judge Dimke's Report and Recommendation.
20 As such, the Court adopts the Report and Recommendation in its entirety.

21 Accordingly, **IT IS HEREBY ORDERED** that:

22 1. Magistrate Judge Dimke's Report and Recommendation, ECF No. 144,
23 is **ADOPTED**, in its entirety.

24 2. Defendants' Motion for Summary Judgment, ECF No. 70, is
25 **GRANTED**.

26 3. Plaintiff's Motion to Stay, ECF No. 147, is **DENIED**.

27 4. Plaintiff's Motion to Supplement ECF No. 108 with Attachment No. 8,
28 ECF No. 148, is **DENIED**, as moot.

1 5. Plaintiff's Motion for Order to Show Cause, ECF No. 137, is **DENIED**,
2 as moot.

3 6. The District Court Executive is directed to **return** the Fleenor
4 Deposition Records to Plaintiff. Although Plaintiff indicated he wanted this
5 deposition to be filed in the court record, it appears that the relevant parts of the
6 deposition is already part of the record, *see* ECF No 108.

7 7. The District Court Executive is directed to enter judgment in favor of
8 Defendants.

9 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order,
10 forward copies to Plaintiff, counsel, and Magistrate Judge Dimke, and close the
11 file.

12 **DATED** this 18th day of October 2017.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Stanley A. Bastian
United States District Judge